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In The

Supreme Court of the United States

October Term, 1957

No. 1013

JOSEPH E. BOVEY, Warden, Nebraska State Penitentiary, PETITIONER,

V.

LOYD CARROLL GRANDSINGER, RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

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WEKESSER PUBLISHING CO., Law Briefs, Lincoln, Nebr.

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LOYD CARROLL GRANDSINGER, RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

Joseph E. Bovey, Warden, Nebraska State Penitentiary, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit, entered in above-entitled case on April 7, 1958.

CITATIONS TO OPINIONS BELOW.

The opinion of the United States District Court for the District of Nebraska is reported in 153 F. Supp. 201. The opinion of the United States Court of Appeals for the Eighth Circuit is in the case of *Joseph*

E. Bovey, Warden, Nebraska State Penitentiary, Appellant vs. Loyd Carroll Grandsinger, Appellee, No. 15,884, September Term, 1957. April 7, 1958, — F. 2d —.

JURISDICTION.

The opinion of the United States Court of Appeals was filed on April 7, 1958, and judgment was entered on that same day. On April 25, 1958, the United States Court of Appeals for the Eighth Circuit entered an order that on consideration of the motion of the appellant Joseph E. Bovey, Warden, Nebraska State Penitentiary, for a stay of the mandate in this cause pending a petition to the Supreme Court of the United States for a writ of certiorari, the issuance of the mandate is stayed for a period of thirty days, and if within said period of thirty days there is filed with the Clerk of the United States Court of Appeals for the Eighth Circuit a certificate of the Clerk of the Supreme Court of the United States that a petition for writ of certiorari and record have been filed, the stay shall continue until the final disposition of the case by the Supreme Court. The jurisdiction of this court is invoked under 28 U. S. C. Section 1254 (1).

This cause had its origin in the District Court of Cherry County, Nebraska, where on June 16, 1954, a jury found Loyd Carroll Grandsinger guilty of murder in the first degree and fixed the penalty at death (R. 10, 27, 29). On December 16, 1955, the Supreme Court of Nebraska affirmed the judgment of the District Court of Cherry County, Nebraska (R. 11, 32), the written opinion of Supreme Court of Nebraska being reported in 161 Neb. 419, 73 N. W. 2d 632. On

October 22, 1956, the United States Supreme Court entered an order denying a petition for writ of certiorari (R. 14, 47). *Grandsinger* v. *State of Nebraska*, 352 U. S. 880.

Loyd Carroll Grandsinger, the respondent herein, then filed his application for a writ of habeas corpus in the United States District Court for the District of Nebraska (R. 1) setting forth that he was imprisoned by Joseph E. Bovey, Warden, Nebraska State Penitentiary, under the terms of a judgment and conviction alleged to be null and void on the grounds that during his trial in the state court there was a denial of due process of law as guaranteed by the Fourteenth Amendment to the United States Constitution because of misconduct on the part of one of his two attorneys.

QUESTIONS PRESENTED.

1. Was the respondent denied due process under the Fourteenth Amendment to the United States Constitution, where his father, in behalf and with approval, had employed two recognized and experienced attorneys to represent him, where one of these attorneys altered a prosecution exhibit, and this action was brought to the attention of the jury, where this respondent continued to have the services of this attorney for almost two years thereafter, until after his judgment of conviction had been affirmed by the Supreme Court of Nebraska, and where, upon his subsequent habeas corpus proceeding in the United States District Court, this respondent testified, but did not repudiate the act of his trial counsel?

2. Does the due process clause of the Fourteenth Amendment incorporate as such, the specific guaran-

tees in the Sixth Amendment of the United States Constitution with reference to the assistance of counsel for an accused in a criminal prosecution?

3. Is an attorney employed by an accused for his defense in a state criminal proceeding an officer of the state so as to make his action state action for purposes of the Fourteenth Amendment to the United States Constitution?

CONSTITUTIONAL PROVISIONS INVOLVED.

Constitution of the United States of America, Article XIV, Section 1:

> "* * * No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law: * * *."

STATEMENT OF THE CASE.

The respondent Loyd Carroll Grandsinger was charged with the crime of first degree murder in the shooting of Marvin Hansen, a member of the Nebraska Safety Patrol, on or about April 8, 1954, in Cherry County, Nebraska (R. 19). Loyd Carroll Grandsinger, born in Valentine, Nebraska, and raised on a farm in South Dakota (R. 203), had been living in Los Angeles, California, and had left there for Nebraska on April 3, 1954, with his brother Leon, after taking a .22 caliber pistol. On the trip to Nebraska another car was taken in Wyoming, other cars were prowled, and on April 7, 1954, the Grandsingers had broken into a post office and store in Wewela, South Dakota (R. 207-218).

On the night of April 8, 1954, with Leon Grandsinger driving one car towing a car driven by the respondent Loyd Carroll Grandsinger, the brothers were stopped near Valentine, Nebraska, by Cherry County Sheriff William C. Freeman and by Patrolman Marvin Hansen (R. 204, 240). Both officers had Smith & Wesson .38 revolvers (R. 240). While Leon Grandsinger was getting out of the front car and backing up towards Sheriff Freeman, the Sheriff heard a car door and noise at the second car (R. 240). He heard the occupant of that car start running, heard Patrolman Hansen holler "Stop" and there was a pause, Hansen said "Get up," and there was a shot which the Sheriff said was a .22 (R. 240), followed by other shots, both .38's and .22's. Marvin Hansen was killed, with the medical opinion being that the cause of death was a massive loss of blood due to a bullet wound through the aorta, which could have been produced by a .22 caliber and could not have been caused by a .38 caliber bullet (R. 242). Loyd Carroll Grandsinger was apprehended the next day. Exhibit 11, Patrolman Hansen's Sam Browne Belt was in evidence, and there was testimony that the holes found in the belt in the outer flap, and in the belt proper, could not have been made by a .38 caliber bullet, but could have been made by a .22 caliber bullet (R. 247). Also in evidence was Exhibit 10, Patrolman Hansen's pants belt. Two written statements taken from Loyd Carroll Grandsinger were also in evidence in the trial in the District Court of Cherry County, Nebraska (R. 207-218, R. 221-224). It was the contention of the State of Nebraska at the trial in the District Court of Cherry County, Nebraska, that Patrolman Marvin Hansen's death was caused by a wound produced by a .22 caliber bullet, that Loyd Carroll Grandsinger

had in his possession at the time of the shooting a .22 caliber pistol and that he shot Hansen with this pistol.

Two attorneys, William C. Heelan, of Valentine, Nebraska, and Charles A. Fisher, of Chadron, Nebraska, were employed for Loyd Carroll Grandsinger by his father (R. 206). On the tenth day of the trial, Rush C. Clarke, an attorney appointed by the court to assist in the prosecution, was in the District Judge's chambers with defense counsel Heelan and the presiding judge (R. 237). The Cherry County Attorney and defense counsel Charles A. Fisher came into the chambers, and there was a conference after which these proceedings took place before the jury before the case was submitted to the jury:

" 'By Mr. Clarke:

"Before we proceed with the arguments, Your Honor, there is a matter that has been taken up with, Your Honor, which we wish to get into the record.

"The Court: Very well.

"Mr. Clarke: We wish the record to show that counsel for the defendant, is willing that it shall show, that this morning in this court room, after the court reporter had brought all of the exhibits in the case out and laid them on the reporter's desk, Mr. Fisher, one of the counsel for the defendant, while he was examining Exhibit No. 10, being the leather pants belt heretofore identified as the belt of Marvin Hansen, and that at that time he took a dowel, being one of the wooden dowels on the reporter's desk, and being either the same or one exactly like the one I am holding in my hand, which I will have to have marked as an exhibit, and pushed it violently—

"Mr. Fisher: (Interrupting) I didn't violently push it—

"Mr. Clarke: (Interrupting) pushed it through the hole in the belt hard enough so that it materially enlarged the (fol. 207) size of the hole to an extent which cannot now be determined and that the belt, Exhibit No. 10, is not now in the same condition as it was when it was offered in evidence and received in evidence, and that the hole is now materially larger than it was before Mr. Fisher did that.

(Mark this dowel as an exhibit, please.)

(The wooden dowel refered to was marked as Exhibit No. 75.)

"The Court: Mr. Fisher, as I understand it you have told counsel that you did that?

"Mr. Fisher: Yes.

"The Court: You recognize that the hole is larger?

"Mr. Fisher: Yes.

"The Court: The court admonishes all counsel and everyone else and the jury when they go out to deliberate upon this matter to not probe these exhibits. They can make comparisons but they cannot probe these belts with any dowel, or change the condition of any exhibits. Very well, you may proceed.'"

On June 16, 1954, the jury returned a verdict of guilty of murder in the first degree and fixed the penalty at death (R. 10, 27, 29).

Defense counsel William C. Heelan died thereafter (R. 206), and Charles A. Fisher continued to represent Loyd Carroll Grandsinger. On December 16, 1955,

the Supreme Court of Nebraska affirmed the judgment of the District Court of Cherry County, Nebraska (R. 11, 32). After a motion for rehearing was overruled (R. 11), on April 30, 1956, Loyd Carroll Grandsinger filed with the Supreme Court of Nebraska a notice of dismissal of Charles A. Fisher as his counsel and of retention of Eugene D. O'Sullivan, Sr., of Omaha, Nebraska, as his counsel (R. 12, 41, 42). A second motion for rehearing was filed, in which it was contended that confessed criminal misconduct of chief defense counsel, Charles A. Fisher, deprived the respondent of the effective and unqualified representation of counsel required in state capital cases by the Fourteenth Amendment of the United States (R. 12, 42-45). This motion was overruled on June 30, 1956, (R. 13, 46). On July 9, 1956, respondent filed a petition for a writ of certiorari to the Supreme Court of the State of Nebraska with the Supreme Court of the United States (R. 14, 93), in which the same question of effective assistance of counsel was raised (R. 14, 93). On October 22, 1956, the United States Supreme Court entered an order denying the petition for writ of certiorari (R. 14, 47), *Grandsinger* v. *State of Nebraska*, 352 U. S. 880.

Loyd Carroll Grandsinger then filed his application in the United States District Court for the District of Nebraska contending that his judgment and sentence was null and void because during his trial for first degree murder a conflict of interest arose which destroyed his trial counsel's ability effectively to represent him, and due to this conflict of interest he was deprived of the effective and unqualified representation of counsel which the Fourteenth Amendment to the United States Constitution commands to be af-

forded to a defendant in a state capital case (R. 1-4). It was alleged that his chief counsel was caught tampering with a prosecution exhibit, the pants belt, that his counsel permitted his misconduct to be brought to the jury's attention, and that his counsel's willingness to have this conduct brought to the jury's attention was a flagrant violation of duties counsel owed to him. In the opinion of the United States District Court (R. 114, 178, 179), the court said that Loyd Carroll Grandsinger had been denied effective assistance of counsel contrary to Constitutional guarantees by the action of his counsel, and held that the judgment and sentence is void (R. 179, 180). Grandsinger was left subject to custody under the information filed by the State of Nebraska in the District Court of Cherry County charging him with commission of murder in the first degree and to eventual and timely trial (R. 180). Upon appeal to the United States Court of Appeals for the Eighth Circuit, that court on April 7, 1958, affirmed the judgment appealed from.

REASONS FOR GRANTING THE WRIT.

Loyd Carroll Grandsinger, the respondent, was charged with first degree murder, and his father, in his behalf and with his approval, employed two recognized and experienced attorneys to represent him (R. 170). One of these attorneys, on the tenth day of the trial, for what reason, if any, is not disclosed, altered an exhibit, and the circumstances were brought to the attention of the jury. This was done without the prosecuting attorney or the trial judge indicating directly or indirectly that the act of this defense counsel was done for any improper purpose. The

facts were given to the jury without the defense counsel being reprimanded, condemned, or charged with attempting to hinder justice. Loyd Carroll Grandsinger continued to have this same attorney while proceedings to review his conviction were had in the Nebraska Supreme Court, he chose to dismiss his counsel and put him on trial, and by an attack upon his counsel, to set aside his own conviction. The attorney concerned was dismissed, but not until there had been at least an acquiescence of almost two years. In the opinion of the United States District Court, the court stated that the respondent is alert and intelligent in appearance, and he readily and clearly understands and uses the English language (R. 140). He had completed grade school courses and between one and two years of high school courses (R. 140). He had never been in a trial before, but he had been in court before and plead guilty (R. 206). When he testified in the federal court in his habeas corpus action he had the opportunity for repudiation, for denial, for accusation. He said only that he did not consent to having his motion for new trial heard and ruled on the same day the verdict was returned and he was sentenced (R. 207).

It is submitted that there is an important question of federal law which should be settled by this Court, and that the Court of Appeals has rendered a decision in conflict with decisions of other courts of appeal on the same matter.

QUESTION 1.

The United States District Court for the District of Nebraska and the United States of Appeals for the

Eighth Circuit have held that there is a denial of due process under the Fourteenth Amendment to the United States Constitution where a defendant in a state criminal proceedings has had counsel of his selection, where this counsel has altered a prosecution exhibit, where the defendant had continued the services of his counsel for almost two years, and where this defendant has not testified that the questioned act of his counsel was not authorized or permitted by him.

This decision is in conflict with decisions of other courts of appeals. One such conflicting decision is *Tompsett* v. *State of Ohio*, 6 Cir., 146 F. 2d 95, certiorari denied 324 U. S. 869. It was held:

> "The concept of this rule is that the lack of skill and incompentency of the attorney is imputed to the defendant who employed him, the acts of the attorney thus becoming those of his client and so recognized and accepted by the court, unless the defendant repudiates them by making known to the court at the time his objection to or lack of concurrence in them. A defendant cannot seemingly acquiesce in his attorney's defense of him or lack of it and, after the trial has resulted adversely to defendant, obtain a new trial because of the incompetency, negligence, fraud or unskillfulness of his attorney."

In *United States ex rel. Darcy* v. *Handy*, 3 Cir., 203 F. 2d 407, certiorari denied, 346 U. S. 865, the court held that allegations of a petition with respect to relator's trial counsel's lack of diligence and competency, even if proved, would not afford basis for the issuance of the writ of habeas corpus. It was said:

> "* * **It necessarily follows that any lack of skill or competency of counsel must in these cir-

> cumstances be imputed to the defendant who employed him rather than to the state, the acts of counsel thus becoming those of his client and such so recognized and accepted by the court unless the defendant repudiates them by making known to the court at the time his objection to or lack of concurrence in them. A defendant cannot seemingly acquiesce in his counsel's defense of him or lack of it and, after the trial has resulted adversely, have the judgment set aside because of the alleged incompetence, negligence or lack of skill of that counsel,"

It was noted in this opinion that there may be circumstances where the representation of a defendant by his counsel is so lacking in competence or good faith that it could be the duty of the trial judge or prosecutor to observe and correct it. However, in this case, the officers of Nebraska were compelled to bring certain facts before the jury which they did without condemning or reprimanding counsel, and counsel continued to represent Loyd Carroll Grandsinger for almost two years before being dismissed. And even in the habeas corpus proceedings, this respondent did not repudiate the action of his trial counsel by making known to the United States District Court his objection to or lack of concurrence in that action.

In *Andrews* v. *Robertson*, 5 Cir., 145 F. 2d 101, certiorari denied, 324 U. S. 874, the court said:

> "The Federal Court, in habeas corpus proceedings, cannot set itself up as the admeasurer of the legal capacity of counsel of defendant's own selection in the trial of a case in the State Court to the end that the defendant may put his own counsel on trial after the end of his own has been reached."

In *Miller* v. *Hudspeth*, 10 Cir., 176 F. 2d 111, the petitioner, who had been sentenced to death in Kansas for the murder of a police officer, alleged in a habeas corpus proceeding that his attorney was so wholly incompetent that in fact and in law he was not represented by counsel as contemplated by the Federal Constitution. The opinion reads:

> "* * * A new trial may not be declared and a petitioner may not be released from custody because of mistakes on the part of his counsel. If the test to be applied depended upon the skill with which a defendant was represented, there never would be any finality to a trial * * *."

QUESTION 2.

The Sixth Amendment of the United States Constitution provides that an accused shall in criminal prosecutions have the assistance of counsel for his defense. This specifically applies to the federal courts, as noted in *Johnson* v. *Zerbst*, 304 U. S. 458, and in *Glasser* v. *United States*, 315 U. S. 60. A state prosecution was involved in the leading case of *Powell* v. *Alabama*, 287 U. S. 45, in which defendants were ignorant, illiterate, inexperienced and friendless Negro boys who were charged with the rape of white girls. From the time of arraignment until the beginning of their trial they did not have the aid of counsel, since no lawyer was appointed by the court until the morning of the trial. The question was:

> "* * * We confine ourselves * * * to the inquiry whether the defendants were in substance denied the right of counsel, and if so, whether such denial infringes the due process clause of the Fourteenth Amendment."

The opinion did not say that the due process concept of the Fourteenth Amendment incorporates the specific guarantees of counsel expressed in the Sixth Amendment. The opinion reads:

> "* * * All that it is necessary now to decide, as we do decide, is that in a capital case, where the defendant is unable to employ counsel, and is incapable adequately of making his own defense because of ignorance, feeble-mindedness, illiteracy, or the like, it is the duty of the court, whether requested or not, to assign counsel for him as a necessary requisite of due process of law; and that duty is not discharged by an assignment at such time or under such circumstances as to preclude the giving of effective aid in the preparation and trial of the case * * *."

The limitations of the Sixth Amendment as to federal prosecutions were also expressed in *Betts* v. *Brady*, 316 U. S. 455.

QUESTION 3.

The decision below is in conflict with decisions of other courts of appeals on another point, for it has been held in other courts that an attorney for an accused in a state criminal proceeding is not an officer of the state so as to make his action state action for purposes of the Fourteenth Amendment to the United States Constitution. This conclusion was reached in *Berg* v. *Cranor*, 9 Cir., 209 F. 2d 567, and in *United States ex rel. Darcy* v. *Handy*, 3 Cir., 203 F. 2d 407, certiorari denied, 346 U. S. 865, in the separate opinion of Circuit Judge Maris.

CONCLUSION.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT.

No. 15,884.

Joseph E. Bovey, Warden, Nebraska State Penitentiary, Appellant,

vs.

Loyd Carroll Grandsinger, Appellee.

Appeal from the United States District Court for the District of Nebraska.

[April 7, 1958.]

Ralph D. Nelson, Assistant Attorney General of Nebraska, (Clarence S. Beck, Attorney General of Nebraska, was with him on the brief) for Appellant

Charles H. Flansburg (Eugene D. O'Sullivan, Sr., was with him on the brief) for Appellee.

Before SANBORN, WOODROUGH and VOGEL, Circuit Judges

SANBORN, Circuit, Judge.

This is an appeal by the Warden of the Nebraska State Penitentiary from a judgment in a habeas corpus

proceeding brought by Loyd Carroll Grandsinger, an inmate of that institution, held under a sentence of death imposed by the District Court of Cherry County, Nebraska, on June 16, 1954. The sentence was based upon the verdict of a jury finding him guilty of first-degree murder in the shooting and killing, on April 8, 1954, of Marvin Hansen, an officer of the State Safety Patrol, and fixing death as the penalty. On review, the Supreme Court of Nebraska affirmed the conviction and sentence. *Grandsinger* v. *State,* 161 Neb. 419, 73 N.W.2d 632.

The judgment appealed from determined that at Grandsinger's trial he had been denied effective representation by counsel, in violation of the due process clause of the Fourteenth Amendment to the Constitution of the United States, and that his sentence and the death warrant under which he was confined were therefore void.

In his petition for release on habeas corpus, filed in forma pauperis, Grandsinger (represented by counsel appointed for him by the District Court, who have also represented him in this Court) asserted that he had exhausted his remedies in the courts of the State of Nebraska; that at his trial in the District Court of Cherry County, Nebraska, his constitutional rights under the due process clause of the Fourteenth Amendment were violated: (1) in that coerced and involuntary confessions made by him between the time of his apprehension and the time he was given a preliminary hearing were received in evidence at his trial; and (2) because of an occurrence which took place on the last day of the trial, involving his chief trial counsel, the Special Prosecutor for the State, and the State trial judge,

Grandsinger was deprived of effective representation by counsel.

The issues raised by the petition, the return of the Warden to an order to show cause, and the counter showing made by Grandsinger, were tried before Judge John W. Delehant, of the United States District Court for the District of Nebraska. In an exhaustive opinion (*Grandsinger* v. *Bovey*, 153 F.Supp. 201), setting forth with meticulous accuracy every proceeding, fact, matter and thing which had any bearing upon the questions presented to him, the Judge decided: (1) that Grandsinger had exhausted his State remedies (page 217 of 153 F.Supp.); (2) that the admission in evidence at his trial of his allegedly coerced confessions had not violated his constitutional rights under the due process clause of the Fourteenth Amendment (pages 226-229 of 153 F.Supp.); and (3) that the occurrence at the trial upon which Grandsinger based his claim that he was deprived of the effective representation of his counsel, did have that result and vitiated his conviction and the sentence imposed upon him (pages 239-240 of 153 F.Supp.).

The judgment from which this appeal is taken was entered July 29, 1957. It declared that the death sentence imposed upon Grandsinger was unconstitutional and void. It enjoined the execution of the sentence and discharged him from custody in so far as that depended upon the sentence and a death warrant issued by the Supreme Court of Nebraska on October 29, 1956. The judgment provided that custody of Grandsinger should be retained by the Warden pending review of the federal court judgment, and that the County of Cherry, State of Nebraska, should have six months from the date of the completion of review proceedings within

which to retry Grandsinger, and provided for his continued custody during the retrial, and for his release in case there was no retrial.

The facts, inferences and the law upon which Judge Delehant based his conclusion that Grandsinger at his trial was deprived of his constitutional right to the effective assistance of counsel are fully set forth in his opinion, on pages 230-240 of 153 F.Supp.

The record on appeal shows that at Grandsinger's trial for murder in the first degree, he was represented by William C. Heelan and Charles A. Fisher, of the Nebraska bar, who had been retained by Grandsinger's father to defend him. Mr. Fisher was the principal trial attorney. Rush C. Clarke, as special prosecutor, represented the State. The trial, which had opened on June 5, 1954, was concluded on June 15. It appeared that at the time of the shooting of Marvin Hansen, near midnight of April 8, 1954, Loyd Grandsinger and his brother Leon were armed with .22-caliber pistols or revolvers. Leon was driving an automobile which they had stolen in Wyoming, and was towing an old Ford car belonging to Loyd Grandsinger, which he was guiding. The Grandsingers, on their way east from California, had committed various thefts, aside from the stealing of the automobile which was being driven by Leon, and had apparently burglarized, the night before a store and post office at Wewela, South Dakota.

The Sheriff of Cherry County, Nebraska, had been informed as to the proposed movements of the Grandsingers on the night of April 8. Accompanied by officer Hansen in an automobile, the Sheriff overtook the Grandsingers on Highway 7 in Cherry County, and undertook to arrest them. The Sheriff took Leon Grand-

singer into custody without difficulty and with no shots having been fired. Loyd left the right side of the towed automobile and sought to escape in the darkness. Hansen undertook to capture him. Shots were fired, and shortly thereafter Hansen was found, fatally wounded by a bullet which it was later discovered had pierced both the Sam Brown belt and the pants belt which he was wearing. Loyd Grandsinger fled from the scene of the shooting, but was captured by a posse the following day.

The State of Nebraska charged, and undertook to prove at the trial, that the only gun which could possibly have been used to kill Marvin Hansen was that in the possession of Loyd Grandsinger. Both the Sheriff and Hansen carried .38-caliber revolvers. The belts worn by Hansen when he was shot were introduced in evidence. The bullet holes in the belts showed that he had not been shot by his own gun or that of the Sheriff. The medical evidence was to the effect that Hansen's death was caused by a small-caliber bullet.

It is safe to say that, in view of the State's evidence, no man ever stood in greater need of the effective aid and assistance of counsel than did Loyd Grandsinger at the close of the evidence. Apparently his only hope was that the jury might convict him of manslaughter or might, if it found him guilty of murder in the first degree, fix the penalty at life imprisonment instead of death. The likelihood of his acquittal was virtually nonexistent. Then occurred the almost incredible events which Judge Delehant concluded resulted in depriving Loyd Grandsinger of effective representation by his trial counsel.

Mr. Fisher, prior to the appearance of the jury on the last day of the trial, but after the exhibits had been

brought into the courtroom, was discovered by the County Attorney of Cherry County materially enlarging, by the use of a dowel, the bullet hole in the pants belt worn by Hansen when he was shot. Mr. Fisher was taken into the trial judge's chambers. What transpired there is not shown, but can readily be inferred. Thereafter the following record was made by the Special Prosecutor, with the acquiescence of the trial judge and of Mr. Fisher, in the presence and hearing of the jury, immediately before the closing arguments in the case:

"By Mr. Clarke [the Special Prosecutor]:

"Before we proceed with the arguments, your Honor, there is a matter that has been taken up with Your Honor, which we wish to get into the record.

"The Court: Very well.

"Mr. Clarke: We wish the record to show that counsel for the defendant, is willing that it shall show, that this morning in this court room, after the court reporter had brought all the exhibits in the case out and laid them on the reporter's desk, Mr. Fisher, one of the counsel for the defendant, while he was examining Exhibit No. 10, being the leather pants belt heretofore identified as the belt of Marvin Hansen, and that at that time he took a dowel, being one of the wooden dowels on the reporter's desk, and being either the same or one exactly like the one I am holding in my hand, which I will have to have marked as an exhibit, and pushed it violently——

"Mr. Fisher: (interrupting) I didn't violently push it—

"Mr. Clarke: (Interrupting) pushed it through the hole in the belt hard enough so that it materially enlarged the size of the hole to an extent which cannot now be determined and that the belt, Ex-

hibit No. 10, is not now in the same condition as it was when it was offered in evidence, and received in evidence, and that the hole is now materially larger than it was before Mr. Fisher did that.

"(Mark this dowel as an exhibit, please.)

"(The wooden dowel referred to was marked as Exhibit No. 75.)

"The Court: Mr. Fisher, as I understand it you have told counsel that you did that?

"Mr. Fisher: Yes.

"The Court: You recognize that the hole is larger?

"Mr. Fisher: Yes.

"The Court: The court admonishes all counsel and everyone else and the jury when they go to deliberate upon this matter to not probe these exhibits. They can make comparisons but they cannot probe these belts with any dowel, or change the condition of any exhibits. Very well, you may proceed."

Judge Delehant found that Loyd Grandsinger had not seen, and did not know of, Mr. Fisher's misconduct, had not participated in the proceedings relative thereto which took place in the trial judge's chambers, and was not shown to have participated in or to have given his approval of the statement the special prosecutor made a matter of record in the jury's presence.

Judge Delehant's appraisal of these events and of their effect upon the trial of Loyd Grandsinger is graphically stated by him as follows (pages 235-236 of 153 F.Supp.):

"From that ordeal in chambers, Mr. Fisher emerged manifestly beaten and crushed. What immediately ensued leaves no doubt on that score. For the state's special prosecutor, eager for the kill and with his wounded victim all too plainly ac-

quiescent, at once set the stage and in the presence of the jury that was so shortly to pass on the petitioner's guilt and right to continue to live, recounted, and made Mr. Fisher to admit, the latter's shameful act. And Mr. Fisher readily acknowledged it with only a minor haggling over a single word, and that, in the circumstances, not really important. Nor can it be forgotten that this occurred in the presence and with the ostensible approval, however reluctantly given, of the trial judge, a matter of no little significance to the jury.

"While it has been argued on the present submission that only petitioner's own counsel not provided by the state but employed by his father in his behalf, transgressed, and the State of Nebraska was without fault, there is no virtue in that position. It can hardly have been advanced sincerely. For, once Mr. Fisher had been overtaken in his misconduct, Mr. Clarke, who appeared and prosecuted specially for the State of Nebraska and, therefore, acted in its behalf, became the aggressor and, with studied and much too evident purpose, turned Mr. Fisher's wrong into an incident dramatically publicized in the jury's presence, to Mr. Fisher's humiliation and disgrace and petitioner's immense peril. It does not lie now with the State of Nebraska smugly and falsely to exclaim 'Shake not they gory locks at me, nor say I did it'. Moreover, the position of the state is not wholly clear, insofar as it is rooted in the action of the trial judge. He presided over the trial, including the dragging of the errant Mr. Fisher before the jury. And he may not be wholly absolved from responsibility for the record that was then made. It is true that he was confronted with a hard choice for whose precipitation he was not at all responsible. But, whether from the standpoint of the special prosecutor or from that of the trial judge, the loss of two weeks of valuable trial time, even the haz-

ard of the erection of a double jeopardy defense or any other allowable alternative, might well have been preferred to that which actually was done to the already hard pressed petitioner.

"In that instant and by that display, what had theretofore been an orderly trial was perverted into a virtual legal lynching. From that time forward, Mr. Fisher stood discredited before the jury in respect of petitioner's case. The argument he was shortly to make was stripped of its persuasiveness and effectively damned in the jury's estimation; for his acknowledged trickery would rise at every turn to plague him and to nullify his contentions. More directly to the point, petitioner's case itself was discredited. For implicit in the brief but startling exposure before the jury of Mr. Fisher's wrongdoing was an admission that the defense was so devoid of merit as to need gross deception and falsification of the evidence for its support. And it was in that sordid atmosphere that the closing arguments were made, the instructions were given and the case was submitted to the jury for its deliberation."

Judge Delehant's conclusion that the effectiveness of Loyd Grandsinger's trial counsel was destroyed by his gross misconduct in altering a material State's exhibit, and by the action of the special prosecutor in making that misconduct known to the jury before the case was submitted was, we think, fully justified. The Warden and the State of Nebraska are now in no position to claim that the action of the special prosecutor in publicizing the misconduct of Grandsinger's counsel did not have the effect that it was obviously intended to have.

The question for decision, then, is whether, in a capital case tried in a State court, a conviction and death

sentence can, in view of the due process clause of the Fourteenth Amendment, be sustained notwithstanding an occurrence, such as that which took place in the Grandsinger trial, resulting in the deprivation of the effectiveness and usefulness of the defendant's counsel. There can, we think, be no serious doubt as to the answer.

Due process requires that a defendant on trial in a State court upon a serious criminal charge and unable to defend himself shall not be denied or deprived of his fundamental constitutional right to the effective aid and assistance of counsel. See and compare, *Powell* v. *Alabama,* 287 U.S. 45, 71-72; *Avery* v. *Alabama,* 308 U.S. 444, 445-447; *Glasser* v. *United States,* 315 U.S. 60, 70-71; *Williams* v. *Kaiser,* 323 U.S. 471; *House* v. *Mayo,* 324 U.S. 42, 46; *Hawk* v. *Olson,* 326 U.S. 271, 274-279.

It is difficult to imagine how the effectiveness of a defendant's counsel could be more completely destroyed than by causing him to confess before the jury, at the close of the evidence at the trial, that he had been guilty of gross misconduct in having tampered with the State's evidence. Because of a deprivation of due process in his State trial, Loyd Grandsinger stands presently "as a firebrand plucked out of the burning" by the Fourteenth Amendment to the Constitution of the United States.

The judgment appealed from is affirmed.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.